Kemuning Setia Sdn Bhd v Tan Kok Siang

HIGH COURT (PENANG) — SUIT NO 22 NCVC-211–12 OF 2015
HADHARIAH SYED ISMAIL J
17 AUGUST 2016

Contract — Breach — Claim for repayment of money paid — Plaintiff rescinded contract and demanded defendant to return money — Defendant counterclaimed for payment owed to him and delivery of vacant possession — Whether plaintiff entitled to recover money from defendant — Whether defendant entitled to reliefs sought in counterclaim — Contracts Act 1950

Plaintiff a housing developer had paid an advance of RM500,000 to the defendant in consideration of the defendant agreeing to serve as the plaintiff's project manager in its housing project till its completion. The payment of RM500,000 took the form of a discounted price of a unit of three storey terrace house purchased by the defendant from the plaintiff vide a sale and purchase agreement dated 10 January 2013 ('the agreement'). The defendant resigned before the project was completed. Consequently, the plaintiff rescinded the contract and demanded the defendant to return the said sum of RM500,000. However in his defence and counterclaim, the defendant argued that he had performed a substantial part of the contract (up to 90%) and contended that the plaintiff had agreed to pay him RM1m of RM500,000 each in two tranches. It was further submitted that the plaintiff had paid the first RM500,000 and owed him the balance of RM450,000. The defendant also testified that he and one Steven Tan ('PW1'), the CEO of PPH Resorts Sdn Bhd ('PPH') had a meeting in Starbucks Cafe on April 2015, where the defendant stated that PW1 told the defendant not to interfere with PPH matter and also threatened not to deliver the vacant possession of property if the defendant lodged a police report against him. The issues for determination were: (a) whether the plaintiff was entitled to recover the sum of RM500,000 from the defendant; and (b) whether the defendant was entitled to the reliefs sought in counterclaim.

Held, allowing the plaintiff's claim as prayed for in prayer 1, 2 and 3 of the statement of claim and dismissing the counterclaim with costs of RM20,000:

(1) The concern of the court was not what the defendant had performed but what he had promised. The defendant himself admitted he had breached his promise. When he resigned prematurely, the defendant agreed he had disabled himself from performing his promise in its entirety. The plaintiff was entitled to apply s 40 of the Contracts Act 1950 ('the Act') and put an

end to the agreement. Thus, the plaintiff had rightly accepted the defendant's repudiation and the contract no longer exist. Since, the defendant was not entitled to gain any benefit under the contract, he had to return the RM500,000 to the plaintiff pursuant to s 66 of the Act (see para 15).

(2) The defendant's testimony, that during his meeting with PW1 in Starbucks Cafe on April 2015, PW1 threatened and persuaded him not to lodge police report against PW1 was a lie. The police report was lodged same six months after the meeting. Further the defendant's failure to reply to the plaintiff's notice of demand clearly showed he was not a truthful witness. The defendant stated that the plaintiff had promised to pay him RM1m in two tranches of RM500,000 each however when tested with the contemporaneous documents and the overall circumstances of the case, the defendant's version was not supported by any evidence (see para 16).

(3) As being the guilty person who breached the gentleman agreement, the defendant could not gain any benefit out of his own wrongdoing. He failed to fulfilled his obligation under the agreement, and until he pays the full purchase price, the plaintiff will not be obliged to deliver the vacant possession of the property to the defendant. Therefore, the defendant's counterclaim could not stand and failed (see para 18).

[Bahasa Malaysia summary

Plaintif pemaju perumahan telah membayar wang pendahuluan sebanyak RM500,000 kepada defendan dalam balasan defendan bersetuju untuk bekerja sebagai pengurus projek plaintif dalam projek perumahannya sehingga ianya siap. Bayaran sebanyak RM500,000 berbentuk harga yang telah dipotong bagi unit rumah teres tiga tingkat yang dibeli oleh defendan daripada plaintif melalui perjanjian jual beli bertarikh 10 Januari 2013 ('perjanjian'). Defendan meletak jawatan sebelum projek tersebut siap. Akibatnya, plaintif membatalkan kontrak dan menuntut defendan memulangkan wang RM500,000 tersebut. Walau bagaimanapun dalam pembelaan dan tuntutan balasnya, defendan berhujah bahawa dia telah melaksanakan sebahagian substansial kontrak tersebut (sehingga 90%) dan berhujah bahawa plaintif telah bersetuju untuk membayarnya sebanyak RM1 juta setiap RM500,000 dalam dua bahagian. Ia selanjutnya dihujahkan bahawa plaintif telah membayar RM500,000 pertama dan masih berhutang dengannya baki sebanyak RM450,000. Defendan juga memberi keterangan bahawa dia dan seorang bernama Steven Tan ('PW1'), Ketua Pegawai Eksekutif PPH Resorts Sdn Bhd ('PPH') bermesyuarat di Starbucks Cafe pada April 2015, di mana defendan menyatakan bahawa PW1 memberitahu defendan untuk tidak campur tangan dengan perkara PPH dan juga mengancam untuk tidak memberi milikan kosong hartanah tersebut jika defendan membuat laporan polis terhadapnya. Isu-isu untuk penentuan: (a) sama ada plaintif berhak

untuk mendapatkan balik jumlah sebanyak RM500,000 daripada defendan; dan (b) sama ada defendan berhak kepada relif-relif yang dipohon dalam tuntutan balas.

Diputuskan, membenarkan tuntutan plaintif seperti yang dipohon dalam permohonan 1, 2 dan 3 pernyataan tuntutan dan menolak tuntutan balas dengan kos sebanyak RM20,000:

(1) Kebimbangan mahkamah bukan apa yang dilaksanakan oleh defendan tetapi apa yang dijanjikan olehnya. Defendan sendiri mengaku yang dia telah memungkiri janjinya. Apabila dia meletakkan jawatan sebelum waktu, defendan bersetuju yang dia telah menghalang dirinya sendiri daripada melaksanakan janjinya secara keseluruhannya. Plaintif berhak untuk menggunapakai s 40 Akta Kontrak 1950 ('Akta') dan menamatkan perjanjian tersebut. Oleh itu, plaintif secara betul menerima pembatalan defendan dan kontrak tidak lagi wujud. Memandangkan defendan tidak berhak untuk memperolehi aapa-apa faedah di bawah kontrak, dia kena memulangkan semula wang sebanyak RM500,000 tersebut kepada plaintif berikutan s 66 Akta (lihat perenggan 15).

(2) Keterangan defendan, bahawa semasa mesyuaratnya dengan PW1 di Starbucks Cafe pada April 2015, PW1 mengancam dan memujuknya untuk tidak membuat laporan polis terhadap PW1 adalah pembohongan. Laporan polis dibuat enam bulan selepas mesyuarat. Selanjutnya kegagalan defendan untuk menjawab kepada notis tuntutan plaintif jelas menunjukkan yang dia bukan saksi yang sebenar. Defendan menyatakan bahawa plaintif telah berjanji untuk membayarnya RM1 juta dalam dua bahagian setiap satu RM500,000 bagaimanapun apabila diuji dengan dokumen semasa dan keseluruhan keadaan kes, versi defendan tidak disokong oleh apa-apa keterangan (lihat perenggan 16).

(3) Sebagai orang yang bersalah yang memungkiri perjanjian 'gentleman', defendan tidak dapat memperolehi apa-apa faedah daripada kesalahannya. Dia gagal untuk memenuhi tanggungjawabnya di bawah perjanjian tersebut, dan sehingga dia bayar harga belian penuh, plaintif tidak bertanggungjawab untuk memberikan milikan kosong hartanah tersebut kepada defendan. Oleh itu, tuntutan balas defendan tidak boleh bertahan dan gagal (lihat perenggan 18).]

Notes

For cases on claim for repayment of money paid, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3507–3509.

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9, FC (refd)

Legislation referred to

Contracts Act 1950 ss 40, 65, 66

Tan Beng Hong (Tan Beng Hong & Co) for the plaintiff.
Simon Murali (Lio & Partners) for the defendant.

Hadhariah Syed Ismail J:

INTRODUCTION

[1] The plaintiff, a housing developer had paid an advance of RM500,000 to the defendant in consideration of the defendant agreeing to serve as the plaintiff's project manager in its housing project known as 98 Greenlane ('the project') till its completion. The payment of RM500,000 took the form of a discounted price of a unit of three storey terrace house purchased by the defendant from the plaintiff in the project ('the property'). The sale and purchase agreement is dated 10 January 2013. The defendant resigned before the project is completed. The plaintiff rescinded the contract and demanded the defendant to return the said sum of RM500,000. In his defence, the defendant contends that the plaintiff has agreed to pay him RM1m of RM500,000 each in two tranches. It was also contended that the plaintiff has paid the first RM500,000 and owed him a balance of RM450,000. It was further contended that the plaintiff has refused to deliver vacant possession of the property purchased despite the project has been completed. Thus, the defendant counterclaims for:

(a) payment of RM450,000;
(b) delivery of vacant possession;
(c) liquidated damages;
(d) interest; and
(e) costs.

THE PLAINTIFF'S CLAIM

[2] The reliefs prayed for by the plaintiff are:

(a) a declaration that the defendant has failed to perform or disabled himself from performing his promise to serve as the project manager in the plaintiff's project known as 98 Greenlane till its completion;

(b) a declaration that the plaintiff is entitled to terminate its agreement with the defendant;

(c) an order that the defendant returned to the plaintiff the sum of RM500,000 together with interest at the rate of 5%pa from 17 July 2014 till satisfaction;

(d) damages for breach of promise;

(e) cost; and

(f) other reliefs deems fit by the court.

[3] Undisputed facts:

(a) the defendant ('DW1') was the project manager of PPH Resorts Sdn Bhd ('PPH') of which Steven Tan ('PW1') was the CEO and a minority shareholder. Sometime in 2007, PPH sold its substantial assets comprising 120 acres of land in Sungai Ara, Bayan Lepas, Penang to SP Setia Bhd;

(b) having disposed of its assets, the defendant found himself redundant with nothing much to do in PPH. The defendant has a degree in civil engineering and a postgraduate degree in Business Administration;

(c) in view of his qualifications and experience as project manager with PPH, PW1 decided to offer him the same position of project manager for the plaintiff's company project known as 98 Greenlane for a lump sum of RM500,000 on his promise to stay on with the plaintiff's company until the completion of its project. The defendant accepted the offer. The contract was not put into writing because parties trust each other;

(d) the contract sum of RM500,000 was given to the defendant in the form of a discount rebate for a property purchased by the defendant from the plaintiff in the plaintiff's project;

(e) the plaintiff sold the defendant a unit of three storey terrace house, Plot 31, Lot No 10131 held under HSD 17851, Section 5, DTL, Georgetown, Penang ('the said property') at the price of RM1,068,000 under a sale and purchase agreement dated 10 January 2013;

(f) the defendant took out a housing loan from United Overseas Bank Bhd ('UOB') for RM568,000 on 5 September 2013 to finance the purchase of the said property;

(g) the plaintiff issued a credit note dated 12 May 2014 for RM500,000 in

favour of the defendant in connection with the defendant's purchase of the said property. To facilitate the drawdown of the defendant's loan, the plaintiff confirmed with the lending bank's solicitors that the difference between the purchase price of the said property and the loan amount had been paid;

(h) during his tenure with the plaintiff, the defendant agreed he played a key role. He liaised with the relevant authorities, the consultants for the project, the landowners, the solicitors and also assisted in the eviction of squatters; and

(i) on 17 July 2014, the defendant tendered his resignation. At the material time the project has not been completed.

THE EVIDENCE

[4] Each party called one witness. PW1 testified as to the effect of the defendant's resignation and why he took more than a year to claim back the money from the defendant. He said he was disappointed and shocked because the defendant left the plaintiff at the time when his services is needed most. He also said the defendant's resignation has left the plaintiff's company in a quandary and had caused delay to the plaintiff's project. When asked by the defendant's counsel as to why he took more than a year to demand for the returned of the money, PW1 said he waited for the project to complete in March 2015 and ready for delivery. Then, sometimes in April or May 2015, he met the defendant at Starbucks Cafe at Seagate, Penang with the purpose to inform the defendant that the RM500,000 discount already made was to be returned to the plaintiff because he had resigned prematurely. At the said meeting, he even suggested to the defendant to sell the three storey terrace house as the value of the house is about RM1.3m. Had he sold the house, he can pay to the plaintiff RM500,000 and still profit RM300,000 as capital gain. The defendant did nothing. Instead he gave a totally different version which I shall deal with later. PW1 admits he had a motive in demanding for the returned of RM500,000. During cross-examination, he was asked the following question:

Q: The actual motive is the plaintiff had no intention to deliver the property with RM500,000.00 discount?

A: Disagree. My motive is the defendant is a very important personnel in my organization. The defendant together with the managing director of Epture and two others filed a suit against the plaintiff based on the same sale and purchase agreement, claiming fraud, misrepresentation etc. The suit is still pending. I entered into a joint venture agreement ('JVA') with trustee of the land owner. As developer, I was allowed a private lease of 99 years with an option to renew 99 year lease. Defendant was fully involved in the application to the Ministry of Housing with regard to the 99 + 99 lease. I feel the defendant's civil

suit is a nuisance. The land search show a lease of 99 years and not 99 + 99. I explained to them, under torrens system, we cannot go beyond 99. Defendant claims he was misrepresented, cheated and Land Office had not put 198 years lease. I was upset. That was my motive to issue notice of demand. I find the defendant has strayed from his original self. He was ill to produce such lies including many other issues. A tit for tat is childish. Had the defendant is grateful to me, I would give a discount of RM500,000.00.

[5] The defendant's version is as follows. PW1 had approached him and offered to appoint him as the plaintiff's general manager. His scope of work include overseeing, supervising and obtaining approval of building plan permission. In consideration, he claims the plaintiff has agreed to pay him RM1m. This sum of RM1m is to be paid in two tranches. The first RM500,000 is to be paid after the building plan is approved by Majlis Perbandaran Pulau Pinang ('MPPP'). The second RM500,000 is payable when the project is completed. The original building plan was approved on 19 May 2010. The amended building plan was approved on 18 April 2011. He was grateful when the plaintiff gives him the RM500,000 discount because, without the discount he can't afford to purchase the property. He claims he has carry out his contractual duty in the project up to 90% when he resigned on 17 July 2014. Therefore, he is entitled for payment of RM450,000. When asked what transpired at the meeting with PW1 at Starbucks Cafe in April 2015, DW1 said PW1 told him not to interfere in PPH's matter. He also claims, PW1 had threatened not to give vacant possession of the property if DW1 lodged a police report against PW1. During cross-examination, DW1 agreed that he had broken his promise to serve as the plaintiff's project manager. His answer to the following questions are relevant:

Q: When Kemuning took you in, it was in return of your promise to serve until completion of the project?

A: Agree.

Q: You did not keep that promise. You left?

A: Resignation letter is dated 17.7.2014, before completion of the project.

Q: Since you chose to resign from PPH, you have breached your promise?

A: Correct.

Q: Do you agree when you disabled yourself as project manager or general manager, you put the plaintiff in a quandary?

A: Correct.

[6] When asked to state the reason why he did not reply to the plaintiff's solicitor's notice of demand, DW1 said this is because his lawyer said there is no need to reply.

THE ISSUES

[7] The two main issues before the court are:

(a) first, whether the plaintiff is entitled to recover RM500,000 from the defendant; and

(b) second, whether the defendant is entitled to the reliefs sought in the counterclaim.

First issue

[8] Learned counsel for the defendant submit the plaintiff is not entitled to recover RM500,000 for two reasons, viz:

(a) the civil action taken against the defendant is an abuse of the process of the court as the real intention of commencing the suit was to oppress him; and

(b) there has been no total failure of consideration on the part of the defendant.

[9] With regard to the first reason, it was submitted that the actual reason for the plaintiff commencing this civil action was not to seek redress for a legitimate grievance, but to impose hardship on the defendant. The defendant contends, this suit was conceived from ill feeling of PW1 against the defendant. It was also submitted that there is no plausible explanation as to why the plaintiff took more than a year and three months to rescind the verbal contract and seek repayment of RM500,000. It was further submitted that the plaintiff has no intention of performing its contractual obligation and the present suit is employed as a convenient tool for its malevolent desire. In support, the defendant cited *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637. For this reason, it was submitted that the plaintiff's claim ought to be dismissed.

[10] Moving on to the second reason, it was submitted that the defendant had substantially performed his obligation under the verbal contract before he resigned. It was contended that as at the date of his resignation, more than 90% of the work has been completed on the project. The defendant rely on the following contemporaneous documents:

(a) Third Schedule to SPA, at cl 2(g);

(b) the plaintiff's letter dated 15 May 2014, which confirms at that date, the completion of work was up to stage 2(g); and

(c) letter dated 2 July 2014 from the main subcontractor, which confirms as at that date that 92.20% of the work has been completed.

[11] The above documents show as at 15 May 2014, 75% work has already been completed. The defendant resigned more than two months later. Since the defendant has performed substantial part of his contractual obligation, it is submitted that the plaintiff is not entitled to rescind the contract and claim for refund of RM500,000. In support, *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 was cited. In that case, the Federal Court held that the common law remedy of rescission can only avail if there had been total failure of consideration. If there is no total failure of consideration but instead substantial performance of contractual obligation, the innocent party is only entitled to sue for damages on the unfulfilled part of the contract. It was submitted that the defendant did not leave the plaintiff in a lurch, but at the stage where the project was near completion. Relying on *Berjaya Times Square* case, the defendant submitted that the plaintiff is not entitled to recover RM500,000 because there is no total failure of consideration. Thus, it was further submitted that the plaintiff may seek damages for partial failure of consideration.

[12] In response, learned counsel for the plaintiff submitted the defendant's premature resignation on 17 July 2014 amounts to a repudiation of his oral agreement with the plaintiff for valuable consideration to stay on with the plaintiff as project manager until the completion of project 98 Greenlane. The test to be applied in determining whether there was a repudiation is whether the defendant's act (ie his premature resignation) was such as to lead a reasonable person to conclude that he no longer intended to be bound by his promise to stay on until completion of the project; citing *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291. It was also submitted that the defendant's premature resignation means he refused to perform his promise in its entirety. The effect of the plaintiff's rescission is that the defendant must restore to the plaintiff the full benefit which he had received by way of advance in the sum of RM500,000 under ss 65 and 66 of the Contracts Act 1950. *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9 was cited.

[13] Having heard and considered the parties submissions, this is my conclusion and finding. This is a case of the defendant had promised to serve as the plaintiff's project manager in return of RM500,000 and he broke that promise. But, he had received the said sum of RM500,000 in advance. The contract itself is a conditional contract in the sense that the defendant is entitled to receive the sum of RM500,000 only if he continues to serve as the plaintiff's project manager until the project is completed. The argument

advanced by the defendant that he has performed a substantial part of the contract (up to 90%) and hence is entitled to keep the money necessitate me to refer to s 40 of the Contracts Act 1950.

[14] Section 40 provides as follows:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[15] In this case, the defendant admitted he had promised the plaintiff that he will remain with the plaintiff until the project is completed. When he accepted the said sum of RM500,000 in advance, he has contractually agreed that he will carry out his duty as the project manager until the project is completed. So, the contract is for its entirety. Not based on quantum meruit as alleged by the defendant. The relationship between the plaintiff and the defendant is not like main contractor and subcontractor where the amount of work done can be measured by a quantity surveyor. The contract between the plaintiff and the defendant is a one off contract for completion of the project. The defendant knew the plaintiff relied on his services to complete the project without any glitches. He also agreed that because of his premature resignation, he had caused hardship to the plaintiff and delay in the project. For these reasons, he ought to have known that the purpose the money was paid in advance was to ensure that he would not leave the plaintiff without fulfilling his promise. The defendant must understand if he resigned before the project is completed, he is not entitled to get RM500,000. The concern of the court is not what the defendant has performed. But what he has promised. In this case, the defendant has admitted he had breached his promise. When he resigned prematurely, the defendant agreed he had disabled himself from performing his promise in its entirety. The effect of which, the plaintiff is entitled to apply s 40 of the Contracts Act 1950 and put an end to the agreement. Thus, I hold the plaintiff has rightly accepted the defendant's repudiation and the contract no longer exists. Since the defendant is not entitled to gain any benefit under the contract, he had to return the said RM500,000 to the plaintiff pursuant to s 66 of the Contracts Act 1950.

[16] Another point raised by the defendant is the plaintiff had promised to pay him RM1m in two tranches of RM500,000 each. When tested with the contemporaneous documents and the overall circumstances of the case, I find the defendant's version is not supported by any evidence. Instead it was an established fact that the defendant never replied to the plaintiff's solicitors notice of demand dated 25 October 2015. RM1m is a lot of money. If he strongly believed he is entitled to RM1m he should have replied immediately to the notice of demand, putting his case and claim for RM450,000. This he did not do. His reason for not replying is because his lawyer told him not to

reply. I reject his explanation. His answer shows his version is an afterthought. His testimony that in his meeting with PW1 at Starbucks Cafe, PW1 had threatened and persuade him not to lodge a police report against PW1 when it is proven that the police report was lodged some six months after the meeting proved the defendant is lying in court. Coupled with the fact that he had failed to reply to the plaintiff's notice of demand clearly show the defendant is not a truthful witness. I, therefore reject his version of RM1m.

[17] With regard to the defendant's contention that the reason this suit was brought is to oppress the defendant, I find such contention is unfounded. The plaintiff is not oppressive against the defendant. PW1's testimony revealed it was the defendant who had behaved unreasonably. The plaintiff's claim is based on breach of contract. The plaintiff is entitled to ask for the return of the money. Hence, the first issue is answered in favour of the plaintiff.

Second issue

[18] It was argued for the defendant that the plaintiff had breached the sale and purchase agreement when it refused to deliver vacant possession. As such, the defendant contends he is entitled to compel the plaintiff to deliver vacant possession of the property. That argument is baseless. As I have held earlier, the party who had breached the gentleman agreement is the defendant. As the guilty party, the defendant cannot gain any benefit out of his own wrongdoing. With the plaintiff withdrawing its advance payment of RM500,000 towards the purchase price of the property, the defendant has not fulfilled his obligation under the sale and purchase agreement. Payment of full purchase price is a fundamental term in a sale and purchase agreement of a property. Until the defendant paid the full purchase price, the plaintiff is not obliged to deliver vacant possession of the property to the defendant. Therefore, the defendant's counterclaim could not stand and must fail.

CONCLUSION

[19] In this contract based claim, the evidence adduced support the plaintiff's case that the defendant had breached the contract. As such, the plaintiff is entitled to seek for refund of RM500,000 paid to the defendant. The plaintiff withdrew its claim for damages. In the circumstances, I allowed the plaintiff's claim as prayed for in prayer 1, 2 and 3 of the statement of claim. On the other hand, I find the defendant is guilty of the breach and is not entitled to the delivery of vacant possession and liquidated damages. Hence, I dismiss the counterclaim with cost. The defendant is ordered to pay RM20,000 costs to the plaintiff.

Plaintiff's claim allowed as prayed for in prayer 1,2 and 3 of statement of claim; counterclaim dismissed with cost of RM20,000.

Reported by Mukesh Nair Balakrishnan